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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 David Gallaher,

No. CV-15-0266-TUC-BGM

10 Plaintiff,

ORDER

11 v.
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13 Autovest, LLC,

14 Defendant.
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16 Currently pending before the Court is Defendant Autovest, LLC's Motion for
17 Summary Judgment (Doc. 10). Plaintiff filed his Response (Doc. 20) and Defendant has
18 replied (Doc. 23). Oral argument was held on March 29, 2016. *See* Minute Entry
19 3/29/2016 (Doc. 24).
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23 **I. FACTUAL BACKGROUND**

24 **A. Defendant Autovest, LLC's Relationship to Wells Fargo Financial, Inc.**

25 Defendant Autovest, LLC asserts that on July 8, 2010, it acquired certain
26 contracts, including Plaintiff David Gallaher's contract, from Wells Fargo Financial, Inc.
27 pursuant to agreement. *See* Def.'s Statement of Facts ("SOF") (Doc. 11) at ¶ 1; *see*
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1 Def.'s Mot. for Summ. J. (Doc. 10), Bill of Sale and Assignment of Receivables Pursuant
2 to the Purchase Agreement 7/8/2010 (Exh. "A"). Plaintiff agrees, for purposes of this
3 motion, that Defendant acquired certain contracts; however, contests that it acquired his
4 specific contract. Pl.'s Controverting SOF (Doc. 21) at ¶ 1. Under the terms of the
5 purchase agreement, Wells Fargo granted Defendant a limited power of attorney to
6 execute assignments relating to contracts Defendant had acquired under the agreement.
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8 Def.'s SOF (Doc. 10), Form of Limited Power of Attorney 7/8/2010 (Exh. "C"). Plaintiff
9 asserts that he "denies" this assertion, because "Defendant has not produced a copy of the
10 Agreement, so the terms are unknown." Pl.'s Controverting SOF (Doc. 21) at ¶ 2. The
11 Court notes, however, that Vice President Dean R. Anderson signed the Form of Limited
12 Power of Attorney "[f]or itself and for and on behalf of the other Sellers under the
13 Purchase Agreement[.]" Def.'s SOF (Doc. 10), Exh. "C".

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17 ***B. The Arizona State Court Proceeding***

18 The "Assignment of Installment Contract" ("the Assignment") attached to the
19 complaint filed on behalf of Defendant in the Santa Cruz County Superior Court,
20 *Autovest, LLC v. David Gallaher, et al.*, case number CV-14-258, lists Plaintiff David
21 Gallaher as the obligor under a contract he entered into on February 18, 2008 in
22 connection with the purchase of a 2005 Honda Accord. Def.'s SOF (Doc. 10),
23 Assignment of Installment Contract (Exh. "D"); *see also* Compl. (Doc. 1), Exh. "A." The
24 Assignment identifies the "assignor" as Wells Fargo and was executed by Darren Kazich
25 as an "agent" of Wells Fargo. Def.'s SOF (Doc. 10), Exh. "D"; *see also* Compl. (Doc. 1),
26 Exh. "A." Plaintiff denies that Darren Kazich executed the Assignment and that he was
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1 an “agent” for Wells Fargo. Pl.’s Controverting SOF (Dox. 21) at ¶ 4. Plaintiff’s
2 contention is based on counsel’s statement that Darren Kazich’s exact signature appears
3 on nine other assignments unrelated to this cause of action. *See id.* The Assignment lists
4 Wells Fargo as the original creditor and that the contract was assigned to Autovest on
5 July 8, 2010. Def.’s SOF (Doc. 10), Exh. “D”; *see also* Compl. (Doc. 1), Exh. “A.” The
6 Assignment does not state that Mr. Kazich is an employee of Wells Fargo. *Id.*

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9 Pursuant to the Form of Limited Power of Attorney attached to the agreement
10 between Defendant and Wells Fargo, Wells Fargo gave Defendant a limited power of
11 attorney that granted Defendant the authority to execute assignments relating to the
12 contracts subject to the Agreement. Def.’s SOF (Doc. 10), Exh. “C.” Mr. Kazich was
13 authorized to execute the assignment on behalf of Wells Fargo as its agent pursuant to the
14 Limited Power of Attorney attached to the agreement between Defendant and Wells
15 Fargo. Def.’s SOF (Doc. 10), Basha Decl. at ¶ 6. Plaintiff argues that Ms. Basha’s
16 statement that Mr. Kazich is an employee of Defendant Autovest, LLC is controverted by
17 her prior trial testimony in the New Mexico state court case *Autovest, LLC v. Irene*
18 *Evans*, et al., case number CV-13-2039, in which she stated “Mr. Kazich is a member of
19 the member partners or member companies of Autovest. He is a member of BXS, which
20 is an owner of Autovest, and through the purchase agreement with Wells Fargo, Wells
21 Fargo provided Autovest a power of attorney to sign documents such as this.” Pl.’s
22 Controverting SOF (Doc. 21), Evans Trial Tr. 1/8/2015 (Exh. “B”) at 19:22–20:2.

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27 In the prior Santa Cruz County Superior Court proceeding, Plaintiff admitted that
28 he had financed a vehicle with Wells Fargo and breached that contract. Def.’s SOF (Doc.

1 10), Answer and Affirmative Defenses, *Autovest, LLC v. Gallaher*, et al., Ariz. Superior
2 Ct. Case No. CV14-258 (Exh. “2”) at ¶¶ 4 & 5.

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4 **C. *The Instant Litigation***

5 On June 18, 2015, Plaintiff initiated the current cause of action. *See* Compl. (Doc.
6 1). Plaintiff alleges that “Autovest created the Assignment and attached it to the
7 Complaint [in the Arizona state court action] in order to falsely represent that a Wells
8 Fargo employee signed the document verifying that Mr. Gallaher’s contract ha[d] been
9 assigned to Autovest.” Compl. (Doc. 1) at ¶ 14. Plaintiff further alleges that “Autovest
10 routinely uses these ‘Assignment’ forms signed by Kazich in order to mislead consumers
11 into believing that the statement was signed by a Wells Fargo employee.” *Id.* at ¶ 17.
12 Plaintiff asserts that “Autovest purposefully uses the misleading Assignment to falsely
13 represented [sic] that Wells Fargo provided the Assignment to establish that Plaintiff’s
14 contract had been assigned to Autovest.” *Id.* at ¶ 19. Plaintiff further asserts that “[a]t
15 the time Autovest filed suit and attached the Assignment to the complaint, it knew, or
16 should have known, that its misrepresentation as to the origin of the Assignment was
17 false and misleading to the least sophisticated debtor.” *Id.* at ¶ 20. Plaintiff asserts that
18 Defendant violated Sections 1692e, 1692e(2)(A), 1692e(5), 1692e(10), and 1692e(14), 15
19 U.S.C., of the Fair Debt Collection Practices Act (“FDCPA”).

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22 **D. *Plaintiff’s Controverting Facts***

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24 Upon receipt of the complaint in the Santa Cruz County Superior Court
25 proceeding, Plaintiff reviewed the complaint and attachments, including the document
26 identified as Assignment of Installment Contract. Pl.’s Controverting SOF (Doc. 21),
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1 Gallaher Decl. (Exh. “3”) at ¶ 4. Upon review of the Assignment of Installment Contract,
2 Plaintiff believed it was a document prepared by Wells Fargo and signed by Wells Fargo
3 personnel. *Id.*, Exh. 3 at ¶ 5.
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5 The Limited Power of Attorney states that it is “subject to the terms and conditions
6 of the aforementioned Purchase Agreement,” which is identified as “that certain Purchase
7 Agreement . . . dated as of July 8, 2010.” Def.’s SOF (Doc. 10), Exh. “C.” Defendant
8 has not provided Plaintiff or the Court a copy of the Purchase Agreement.
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11 **II. STANDARD OF REVIEW**

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13 Summary judgment is appropriate when, viewing the facts in the light most
14 favorable to the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
15 (1986), “there is no genuine issue as to any material fact and [] the moving party is
16 entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” if it
17 “might affect the outcome of the suit under the governing law,” and a dispute is
18 “genuine” if “the evidence is such that a reasonable jury could return a verdict for the
19 nonmoving party.” *Anderson*, 477 U.S. at 248. Thus, factual disputes that have no
20 bearing on the outcome of a suit are irrelevant to the consideration of a motion for
21 summary judgment. *Id.* In order to withstand a motion for summary judgment, the
22 nonmoving party must show “specific facts showing that there is a genuine issue for
23 trial,” *Celotex Corp. v. Catrett* in , 477 U.S. 317, 324 (1986). Moreover, a “mere scintilla
24 of evidence” does not preclude the entry of summary judgment. *Anderson*, 477 U.S. at
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28 252. The United States Supreme Court has also recognized that “[w]hen opposing parties

1 tell two different stories, one of which is blatantly contradicted by the record, so that no
2 reasonable jury could believe it, a court should not adopt that version of the facts for
3 purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372,
4 380, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007).
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6 7 8 **III. ANALYSIS**

9 Defendant seeks summary judgment because the Assignment was not materially
10 false or misleading. *See* Def’s. Mot. for Summ. J. (Doc. 10). Plaintiff contends that Mr.
11 Kazich’s signature “leads the least sophisticated debtor to believe that Wells Fargo ha[d]
12 assigned his contract to Autovest.” Pl.’s Response (Doc. 20) at 4. Plaintiff further
13 asserts that the “Assignor” listed in the Assignment is not the same entity listed in the
14 original loan contract and that the Assignment is ineffective under Arizona law. *Id.* at 6–
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18 **A. The FDCPA**

19 “The FDCPA was enacted as a broad remedial statute designed to ‘eliminate
20 abusive debt collection practices by debt collectors, to insure that those debt collectors
21 who refrain from using abusive debt collection practices are not competitively
22 disadvantaged, and to promote consistent State action to protect consumers against debt
23 collection abuses.’” *Gonzales v. Arrow Fin. Serv., LLC*, 660 F.3d 1055, 1060 (9th Cir.
24 2011) (quoting 15 U.S.C. § 1692(e)). “The FDCPA comprehensively regulates the
25 conduct of debt collectors, imposing affirmative obligations and broadly prohibiting
26 abusive practices.” *Id.* at 1060–61 (citations omitted). “The FDCPA is a strict liability
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statue that ‘makes debt collectors liable for violations that are not knowing or intentional.’” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010) (quoting *Reichert v. Nat’l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008)).

Section 1692e broadly prohibits the use of “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. Proscribed conduct includes, but is not limited to:

- (2) The false representation false representation of –
 - (A) the character, amount, or legal status of any debt,

* * *

- (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

- (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

* * *

- (14) The use of any business, company, or organization name other than the true name of the debt collector’s business, company, or organization.

15 U.S.C. § 1692e.

B. Least Sophisticated Debtor

“Whether conduct violations [§ 1692e] . . . requires an objective analysis that takes into account whether the least sophisticated debtor would likely be misled by a communication.” *Gonzales v. Arrow Fin. Serv., LLC*, 660 F.3d 1055, 1061 (9th Cir. 2011) (citations omitted) (alterations in original). “The objective least sophisticated

1 debtor standard is ‘lower than simply examining whether particular language would
2 deceive or mislead a reasonable debtor.’ *Terran v. Kaplan*, 109 F.3d 1428, 1431–32 (9th
3 Cir. 1997) (citations omitted). Moreover, because it is an objective standard, “the
4 specific plaintiff need not prove that []he was actually confused or misled, only that the
5 objective least sophisticated debtor would be.” *Jensen v. Pressler & Pressler*, 791 F.3d
6 413, 419 (3d Cir. 2015) (citations omitted). This standard “ensure[s] that the FDCPA
7 protects all consumers, the gullible as well as the shrewd . . . the ignorant, the unthinking
8 and the credulous.” *Clark v. Capital Cred & Collection Services, Inc.*, 460 F.3d 1162,
9 1171 (9th Cir. 2006) (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318–19 (2d Cir.
10 1993)). “At the same time, the standard ‘preserv[es] a quotient of reasonableness and
11 presum[es] a basic level of understanding and willingness to read with care.’” *Gonzales*,
12 660 F.3d at 1062 (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)).
13 “In this circuit, a debt collector’s liability under § 1692e of the FDCPA is an issue of
14 law.” *Gonzales*, 660 F.3d at 1061 (citing *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th
15 Cir. 1997)).

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21 Additionally, “a false or misleading statement is not actionable under § 1692e
22 unless it is material.” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir.
23 2010). “[M]ateriality is an ordinary element of any federal claim based on a false or
24 misleading statement.” *Id.* (citations omitted). The Ninth Circuit Court of Appeals
25 relying on the Seventh Circuit’s opinion in *Hahn v. Triumph Partnerships LLC*, 557 F.3d
26 755 (7th Cir. 2009), recognized that “[t]he purpose of the FDCPA, ‘to provide
27 information that helps consumers to choose intelligently,’ would not be furthered by
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1 creating liability as to immaterial information because ‘by definition immaterial
 2 information neither contributes to that objective (if the statement is correct) nor
 3 undermines it (if the statement is incorrect).’” *Donohue*, 592 F.3d at 1033. “[I]f a
 4 statement would not mislead the unsophisticated consumer, it does not violate the
 5 [Act]—even if it is false in some technical sense.” *Id.* (quoting *Hahn*, 557 F.3d at 758)
 6 (2d alteration in original).
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9 ***C. Kazich as an Agent of Wells Fargo***

10 Plaintiff’s Complaint asserts that “Autovest routinely uses these ‘Assignment’
 11 forms signed by Kazich in order to mislead consumers into believing that the statement
 12 was signed by a Wells Fargo employee.” Compl. (Doc. 1) ¶ 17; *see also* Pl.’s Response
 13 (Doc. 20) at 4–7.
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15 The assignment indicates David Gallaher as the “obligor,” Wells Fargo Financial,
 16 Inc. as the “assignor” and is signed by “Darren Kazich, Agent.” Def.’s SOF (Doc. 10),
 17 Assignment of Installment Contract (Exh. “D”); *see also* Compl. (Doc. 1), Exh. “A.” The
 18 Oxford English Dictionary defines “agent” as “[a] person who . . . acts upon someone or
 19 something; one who . . . exerts power; the doer of an action.” *OED Online*. Oxford
 20 University Press (March 2016). An “employee” is defined as “[a] person who works for
 21 an employer; *spec.* a person employed for wages or a salary under an employment
 22 contract[.]” *OED Online*. Oxford University Press (March 2016). Accepting Plaintiff’s
 23 contention that the least sophisticated debtor would confuse Darren Kazich position as
 24 that of a Wells Fargo employee as true, the Court finds that such confusion is immaterial.
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 26 Whether one believes that Mr. Kazich is an agent or an employee of Wells Fargo leads to
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1 the same conclusion — he possessed the authority to assign the contract to Autovest.
2 Plaintiff has not demonstrated how this confusion would in any way alter the least
3 sophisticated debtor’s response. At oral argument, Plaintiff’s counsel emphasized that
4 the attachment of the assignment to the state court complaint is what makes the
5 assignment misleading. This assertion is without support. As such, the Court finds
6 summary judgment in favor of Defendant is appropriate.
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9 ***D. Plaintiff’s Additional Arguments***

10 Plaintiff raises additional arguments in his response to Defendant’s summary
11 judgment motion that he did not allege as claims in his Complaint, *e.g.*, invalidity of
12 assignment under Arizona law; incorrect name of lender (Wells Fargo Financial, Inc.
13 instead of Wells Fargo Financial Arizona, Inc.); and the implication that the document is
14 the actual assignment. “A complaint . . . put[s] the defendant on notice of the evidence it
15 needs to adduce in order to defend against the plaintiff’s allegations.” *Coleman v.*
16 *Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000). “Simply put, summary judgment is not
17 a procedural second chance to flesh out inadequate pleadings.” *Wasco Products, Inc. v.*
18 *Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). As such, the Court
19 declines to reach these issues.
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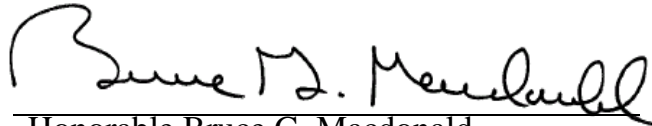
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1 **IV. CONCLUSION**

2 For the reasons discussed, *supra*, Defendant Autovest, LLC's Motion for
3 Summary Judgment (Doc. 10) is GRANTED. The Clerk of the Court shall enter
4 judgment and close its file.
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6 Dated this 30th day of March, 2016.

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9 Honorable Bruce G. Macdonald
10 United States Magistrate Judge
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